UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

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| IN RE: | ) | |
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| THOMAS JOSEPH CAHILLANE, | ) | CASE NO. 04-65210 JPK |
| | ) | Chapter 7 |
| Debtor. | ) | |
| ********** | | |
| GORDON E. GOUVEIA, TRUSTEE, | ) | |
| Plaintiff, | ) | |
| v. | ) | ADVERSARY NO. 05-6144 |
| TC INVESTMENTS, LLC, CHARLES R. SPARKS, and RONALD K NABHAN, | ) | |
| Defendants. | ) | |

MEMORANDUM OF DECISION CONCERNING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This Memorandum of Decision determines the Motion for Summary Judgment filed by the defendants TC Investments, LLC ("TC Investments"), Charles R. Sparks ("Sparks") and Ronald K Nabhan ("Nabhan") on February 28, 2008.

## I. CASE HISTORY

This adversary proceeding was initiated by a complaint filed by Gordon E. Gouveia, Chapter 7 Trustee of the Chapter 7 bankruptcy estate of Thomas Joseph Cahillane under case number 04-65210 ["Trustee"], on August 15, 2005. The designated defendants were TC Investments, Sparks and Nabhan. The defendants filed their answer to the complaint on September 14, 2005. On October 6, 2006, the plaintiff filed a motion for leave to file an amended complaint, which was granted by the court's order entered on December 28, 2006. The amended complaint authorized by that order was filed on December 27, 2006. On March 23, 2007, the court entered its Order of Consolidation Into Adversary Proceeding, which consolidated, by agreement of the parties, a contested matter arising from the Motion to Reject Executory Contract or in the Alternative Lift of Automatic Stay filed by the defendants on February 16, 2007, with adversary proceeding number 05-6144. The March 23, 2007 order

thus combined two separate requests for relief by the defendants – a motion for relief from stay and a motion to compel the Trustee to reject an executory contract – into this adversary proceeding. That order further provided that the respective requests for relief by the defendants would be deemed to be in the nature of counterclaims asserted in the adversary proceeding, and that the Objection to Motion to Reject Executory Contract, or Alternatively, to Lift the Automatic Stay filed by the plaintiff on March 8, 2007 would be deemed to be in the nature of an answer to those two requests for relief.

On January 18, 2007, defendants TC Investments, Sparks and Nabhan filed their answer to the amended complaint. The pleadings were closed on the record by the filing of that answer. Multiple skirmishes followed between the parties – none of which are pertinent to the matter at hand before the court, i.e., the defendants' motion for summary judgment. On December 28, 2007, the court entered its Order Regarding Further Proceedings. This order reluctantly granted the defendants' request to submit this matter to the court by means of the defendants' motion for summary judgment. The order in pertinent part provided:

> IT IS ORDERED that the defendants shall file their motion for summary judgment in accordance with Fed.R.Bankr.P. 7056/Fed.R.Civ.P. 56/N.D.Ind.L.B.R. B-7056-1 by **February 29, 2008**; that the response of the plaintiff, in the manner provided by Fed.R.Bankr.P. 7056/Fed.R.Civ.P. 56/N.D.Ind.L.B.R. B-7056-1 shall be filed by **April 30, 2008**; and that any reply by the defendants to the plaintiff's response shall be filed by **May 30, 2008**.

The defendants filed their motion for summary judgment and supporting materials on February 28, 2008; the plaintiff filed his response to that motion and supporting materials on April 30, 2008, on May 1, 2008 and on May 6, 2008. More skirmishes followed. On June 27, 2008, the court entered its Order Regarding Pending Motions by which the record on the defendants' motion for summary judgment was established. Pursuant to that order, the record before the court with respect to the motion for summary judgment filed by the defendants on February 28,

2008 is the following:

1. The defendants' Motion for Summary Judgment, together with its supporting materials, filed on February 28, 2008;

2. The Response to Defendants' Motion for Summary Judgment, filed by the plaintiff as record entry #92 on April 30, 2008;

3. The plaintiff's "Trustee's Appendix of Designated Evidence" filed on May 1, 2008 as docket record entry #93;

4. The plaintiff's Memorandum in Support of Response to Defendants' Motion for Summary Judgment filed by the plaintiff on May 6, 2008 as record entry #95;

5. That portion of record entry #99, filed on May 30, 2008 by the defendants, which is comprised of sub-file #1 with respect to that filing – the evidentiary material otherwise submitted with that filing apart from sub-file #1 is not part of the record in this summary judgment proceeding.[1]

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[1] The court's Order Regarding Further Proceedings entered on December 28, 2008 was not explicit with respect to the nature of the defendants' reply to the plaintiff's response; however, as is made clear by N.D. Ind. L.B.R. 7056-1, a factual reply was not in the cards for the defendants, and only a reply memorandum was authorized; N.D. Ind. L.B.R. 7007-1(a), which specifically refers to motions under Fed.R.Bankr.P. 7056. Fed.R.Bankr.P. 7056/Fed.R.Civ.P. 56(b) and (c) contemplate the submission of evidentiary material in support of a motion for summary judgment, and the countervailing submission of evidentiary material in opposition to a defendant's motion for summary judgment by the opposing party. While Fed.R.Civ.P. 56(e) provides that the "court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits", N.D.Ind.L.B.R. B-7056-1 provides solely for the filing of evidentiary material by a proponent of a motion for summary judgment, and the countervailing filing of evidentiary material by the opponent of that motion -- there is no provision in that rule for "rebuttal" evidentiary material by the motion's proponent. The reason for this rule is obvious, as evidenced by this record: unless the summary judgment evidentiary record is closed by one submission by the proponent and one submission by the opponent, the parties can jockey back and forth with an innumerable array of supplemental filings, each designed to enhance that party's position with respect to the motion at hand. The record was thus established by the court's Order Regarding Pending Motions, which places the record where it should be placed in accord with Fed.R.Bankr.P. 7056/Fed.R.Civ.P. 56 and N.D.Ind.L.B.R. B-7056-1.

## II. STANDARDS FOR REVIEW OF MOTIONS FOR SUMMARY JUDGMENT

The procedural mechanism of summary judgment is provided by Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Fed.R.Bankr.P. 7056. The principal standard to be followed by the Court in determining a motion for summary judgment is stated as follows in Fed.R.Civ.P. Rule 56(c):

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The summary judgment procedure is intended to be an efficient shortcut for final determination of claims or defenses in a case. As stated in *Celotex Corporation v. Catrett*, 106 S.Ct. 2548, 2555 (1986):

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed.Rule Civ.Proc. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

The inquiry that the court must make is whether the evidence presents a sufficient

disagreement to require trial or whether one party must prevail as a matter of law. *Anderson v. Liberty Lobby*, 106 S. Ct. 2505, 2509-10 (1986). In deciding a Motion for Summary Judgment, the Court should not "weigh the evidence." *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2510-11; *Illinois Bell Telephone Co. v. Haines and Co., Inc.*, 905 F.2d 1081, 1087 (7th Cir. 1990). However, "if evidence opposing a summary judgment is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 106 S. Ct. at 2511; *Trautvetter v. Quick*, 916 F.2d 1140, 1147 (7th Cir. 1990).

The moving party bears the burden of showing that there is an absence of evidence to support the non-movant's case; *Celotex Corp. v. Catrett*, 106 S. Ct. at 2548, 2554 (1986), i.e., the lack of a genuine issue of material fact. *Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1984); *Korf v. Ball State University*, 726 F.2d 1222, 1226 (7th Cir. 1984). However, when challenged by a summary judgment motion, the proponent of affirmative relief thus challenged is “put to the test”, so to speak, and must demonstrate a *prima facie* claim for relief in order to survive the motion. As stated by the Supreme Court in *Celotex, supra.*, 106 S.Ct. at 2552-2553:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is “entitled to a judgment as a matter of law” because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. “[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)....” *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).
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> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for

> its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment "*with or without supporting affidavits*" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose. (footnote omitted)

When ruling on a motion for summary judgment, inferences to be drawn from underlying facts contained in such materials as attached exhibits and depositions must be viewed in a light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 82 S. Ct. 993, 994 (1962); *See also, Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356, (1986) (All inferences to be drawn from the underlying facts must be viewed in a light most favorable to the nonmoving party); *Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1218 (7th Cir. 1984); *Marine Bank Nat. Ass'n. v. Meat Counter, Inc.*, 826 F.2d 1577, 1579 (7th Cir. 1987).

When a motion for summary judgment is made and supported by the movant, Fed.R.Civ.P. 56(e) requires the nonmoving party to set forth specific facts, which demonstrate that genuine issues of fact remain for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. at 1355; the opposing party may not defeat the motion by merely relying on the allegations or denials in its pleadings. In addition, it is not the court's function to extensively

review the record in order to ascertain whether a summary judgment should be either granted or denied. As stated in *Bombard v. Fort Wayne Newspapers, Incorporated*, 92 F.3d 560, 562 (7th Cir. 1996):

> It is not our function to scour the record in search of evidence to defeat a motion for summary judgment; we rely on the nonmoving party to identify with reasonable particularity the evidence upon which he relies. *Id.* The evidence relied upon must be competent evidence of a type otherwise admissible at trial. Thus, a party may not rely upon inadmissible hearsay in an affidavit or deposition to oppose a motion for summary judgment. *Wigod v. Chicago Mercantile Exch.,* 981 F.2d 1510, 1518-19 (7th Cir.1992); *see also* Fed. R. Civ. P. 56(e).

As to review of the factual record involved in the summary judgment process, the Supreme Court in the case of *Anderson, et. al. v. Liberty Lobby, Inc. and Willis A. Carto*, 106 S. Ct. 2505 (1986) held that in determining whether a factual dispute exists on a motion for summary judgment, the court must be guided by the substantive evidentiary standards of the case that are applicable at trial; *See*, Fed.R.Civ.P. 56(e), which requires essentially that materials submitted vis-a-vis a summary judgment motion must be admissible into evidence.

Summary judgments work well only in certain circumstances, principally those in which the facts are relatively simple and are capable of being established by relatively straightforward evidentiary submissions. The mechanism loses its utility when the time and expense to the litigants of submitting a matter for summary judgment begins to approach the time and expense which would be involved were the matter submitted to the court by trial. The court's time in reviewing an extensive summary judgment record, such as that involved in this case, is actually more than that involved in reviewing a trial record, given the standards applied to summary judgment determinations as contrasted to those applicable to deciding the case based upon the record established as the result of a trial.

This case presents a prime example of the inefficacy of the summary judgment process in a case based on multiple alternative theories of recovery, involving extensive "evidentiary"

submissions on both sides. As will be seen, the defendants' submissions in particular fail to conclusively address an issue very much at the threshold of the plaintiff's case, i.e., the seemingly simple issue of the party involved in the transaction at the heart of the plaintiff's case. This issue renders the inordinate amount of time spent in the processing of the summary judgment by the parties and by the court into partially a waste of time, and entrenches the court in its view of the inefficacy of most summary judgment proceedings.

It is rare indeed that the opponent of a summary judgment motion responds in the manner in which the plaintiff responded here, by somewhat delineating[2] specifically the material facts submitted by the defendants with which the plaintiff agreed and those with which the plaintiff disagreed. It is also rare that either party specifically delineates the portions of the record upon which either relies to either support or oppose a motion for summary judgment. The court congratulates the parties on their essential adherence to the procedures for submission of, and opposition to, a summary judgment motion – a rare occurrence indeed.

In this case, by comparison of the defendants' Statement of Material Facts and the Trustee's Statement of Genuine Issues, the Trustee – as the opponent of the motion for summary judgment – agrees completely with only two (2) of the material facts asserted by the defendants, paragraphs 17 and 18 of the defendants' Statement of Material Facts. With respect to the other 37 material facts designated by the defendants, the Trustee either admits certain averments of those facts in part and denies them in part, or denies them in total. Obviously, the defendants' motion for summary judgment depends upon the court's determination that there is no genuine issue of material fact based upon the defendants' evidentiary submission with respect to their motion. Just as obviously, the plaintiff is intent on

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[2] The court uses the phrase "somewhat delineating" because the Trustee's Statement of Genuine Issues in many instances both admits and denies the Defendants' Statement of Material Facts in an ambiguous manner, and it was left to the court to sort out the "evidentiary" materials in the record which respectively related to the admission or to the denial.

creating genuine issues of material fact from evidentiary submissions which it makes in opposition to the defendants' submissions in support of the motion for summary judgment. The resulting record is voluminous. In order to determine the defendants' motion, the court must review all of the materials submitted by the defendants in support of the 37 designated contested material facts, under the standards of Fed.R.Bankr.P. 7056/ Fed.R.Civ.P. 56(e). Whether or not an opponent of a summary judgment motion objects to materials submitted in support of that motion, the court must still review the materials to make certain that the requirements of Fed.R.Civ.P. 56(e) have been met. [3]

The standard required by Fed.R.Bankr.P. 7056/Fed.R.Civ.P. 56(c) – that all inferences with respect to evidence submitted in support/opposition concerning a summary judgment motion be resolved against the proponent of the motion – also presents, in this court's view, an essentially worthless exercise in cases such as this one. In reviewing a summary judgment motion, the court cannot determine issues of fact by balancing the parties' submissions, as would be the case in a trial. Rather, the court must view the record in the light most favorable to the opponent of the motion in order to determine whether or not any reasonable trier of fact could determine the fact against the opponent of the motion in a manner which would sustain that determination against an appeal. This is an incredible burden on a court in a case such as this where nearly every material fact submitted by the proponent of the motion is controverted, or sought to be controverted, by the opponent of the motion. The court's review of any particular material fact submitted by the proponent in a case such as this requires not only review of the evidentiary foundation for that fact by the proponent, but also extensive review of the opponent's evidentiary submissions in opposition to that fact. And yet, the court cannot

[3] Materials submitted in support of a summary judgment motion must be made on personal knowledge, must set forth facts as would be admissible in evidence, and must show affirmatively that the proponent of the evidence is competent to testify to the matters submitted into the record.

finally determine any adequately contested fact whatsoever from this review, after having expended more time and energy than would be involved in deciding the factual issue at trial – the court can only determine whether there is a factual issue for trial which remains to be decided later.

As will be seen, this case would have been much better served – with respect to the time expended by the parties and by the court – if it had just been tried, which is exactly the position the court took for several years in attempting to waylay the defendants' attempt to resolve this case by means of a summary judgment motion.

## III. DETERMINATION OF MATERIAL FACTS CONCERNING "TC INVESTMENTS, LLC"

On February 28, 2008, the defendants filed their "Defendants' Statement of Material Facts", accompanied by multiple and voluminous exhibits. On April 30, 2008, the plaintiff filed his "Trustee's Statement of Genuine Issues", also accompanied by multiple and voluminous exhibits, as filed on May1, 2008. As one might anticipate, the two versions of the material facts asserted to be applicable to this summary judgment proceeding do not correlate in any substantial way.

Under the framework of the defendants' motion, there is a veritable avalanche of material facts to be considered by the court. But the avalanche can be reduced to a mere flurry of wet stuff in the air with respect to certain counts of the amended complaint, because a very critical fact – totally seminal to the case – remains genuinely contested on the record: the identity of the person or entity involved in the real estate transaction which is the focus of the complaint. Like a small pebble rolling down a mountainside in a snowstorm, this one seemingly minute particle determines whether there is a major event (in this case, a trial), or whether there is a pebble buried in the snow at the top of the mountain. In this case, the pebble continues to roll.

The critical issue not met by the defendants' motion is the identity of the person or entity who/which contracted for purchase of the Mariposa property, as the parties have labeled it.

Counts II, III, V, VI, VII, VIII, IX and X of the amended complaint all revolve around a core which concerns the identity of the person/entity as the purchaser of the Mariposa property.[4] Counts I and IV of the amended complaint require the determination of other counts for their implementation, if they are to be implemented at all.

Every factual assertion made by the defendants, including those made in affidavits of participants in transactions, refers to an entity designated as "TC Investments, LLC", an entity which has no legal existence. While the defendants seek to overcome this issue by their arguments, particularly in their reply memorandum, that the legal consequences of an entity's being designated as "TC Investments, LLC", as contrasted to "T.C. Investments, LLC", is immaterial, it is not immaterial on this record. The difference in designation is contested at every step of the way by the Trustee in his response to the defendants' Statement of Material Facts, and the court deems the difference in designation to be a material fact upon which there is a genuine issue

Let's just start from the top. The Trustee has admitted Statement No. 1 ( of the defendants' Statement of Material Facts) in part and denied it in part. The Trustee admits matters relating to "T.C. Investments, LLC", and by his denial of the remainder of Statement 1 essentially states his position that "TC Investments, LLC" and "T.C. Investments, LLC" are not interchangeable, a position totally anchored in this record. The defendants' reference for Statement No. 1 is paragraph 3 of the Affidavit of Thomas Cahillane included in the Defendants' Designation of Evidence filed in support of their motion for summary judgment. Paragraph 3 of

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[4] In their reply brief, the defendants assail the Trustee's utilization of alternative theories in this context, as undercutting the Trustee's contentions. This assertion has no merit; See, Fed.R.Bankr.P. 7008(a)/ Fed.R.Civ.P. 8(e)(2).

that affidavit, including the exhibit to which it refers, does not track the conclusory form of Statement No. 1. Cahillane's affidavit refers to something designated as "TC Investments, LLC". There is nothing in Statement No.1 which addresses an entity designated as "T.C. Investments, LLC". Cahillane may well have organized an entity designated as "TC Investments, LLC": if he did, what is the legal nature of that entity? Is it an assumed business name; is it an anticipatory designation for an entity yet to be formed? Every reference by the defendants to the amorphous "T.C. Investments, LLC" or "TC Investments, LLC" is to "TC Investments, LLC". The court determines that the material facts established with respect to Statement No. 1 and the Trustee's response thereto are that an entity designated as "T.C. Investments LLC'" was recognized by the Indiana Secretary of State effective as of October 10, 2000, and that Articles of Organization for that entity – dated October 4, 2000 and apparently signed by Thomas Cahillane – were received and approved by the Indiana Secretary of State on October 10, 2000.

Statement No. 2 – that "from October 10, 2000 to December 30, 2003, Cahillane remained the sole member, sole manager and sole registered agent of TCI" – is sought by the defendants to be supported by paragraph 3 of the foregoing Cahillane affidavit. "TCI" in this context is "TC Investments, LLC", whatever that entity might be. The Trustee's response does not controvert this assertion. However, the record submitted by the defendants does not support the contention that Cahillane remained in any of these three capacities at any time after October 10, 2000 with respect to "T.C. Investments LLC". The point again is that all of the defendants' evidence relates to an entity designated as "TC Investments, LLC". There is no evidence in this record that an entity designated as "TC Investments LLC" has ever been registered in the Indiana Secretary of State's Office, and in fact, Exhibit "6" in the Trustee's response establishes that no registration has ever been effected at any time through and including April 25, 2008 with respect to an entity so designated.

The defendants' Statement No. 3 brings into focus the divergent use of terminology regarding the designated name of the entity registered in the State of Indiana on October 10, 2000 as "T.C. Investments 'LLC'". The sole asserted support referenced by the defendants for the statement that "(f)rom its inception TCI conducted certain real estate transactions, but by March 1, 2003, TCI was an inactive, valueless entity that possessed no real or personal property" – is paragraph 4 of the Affidavit of Thomas Cahillane. In paragraph 3 of that affidavit, Thomas Cahillane asserted that the entity through which he conducted certain business transactions was "TC Investments, LLC ("TCI")", and thus every reference in the Cahillane affidavit which refers to "TCI" is a reference to an entity designated as "TC Investments, LLC", an entity shown to not have been registered with the Indiana Secretary of State's Office. The dichotomy between an entity registered in the State of Indiana as "T.C. Investments, LLC" and an entity, not registered in the State of Indiana, designated as "TC Investments, LLC" permeates the plaintiff's contentions in this case, and is only enhanced by the defendants' contentions that Cahillane did business as "TC Investments, LLC ("TCI")". As referenced by Statement No. 4 of the defendants' submission, the real estate contract around which the parties' disputes – and many of the counts of the Trustee's complaint – revolve was entered into between "TC Investments, LLC, an Indiana limited liability company, whose address is 605 Washington Street, #1, Valparaiso, Indiana 46483" and Paul Stitt. This contract is referenced in paragraph 4 of the defendants' Statement of Material Facts, by reference to supporting documentation, for the assertions in that paragraph and in paragraphs 5-11 of the Affidavit of Thomas Cahillane. Again, this affidavit refers to the entity involved in transactions concerning the Real Estate Contract attached as Exhibit "B" to the Affidavit of Thomas Cahillane to have been "TCI", an acronym adopted by Cahillane for an entity he has designated as "TC Investments, LLC" -- an entity which the defendants' submissions seek to establish as identical to the entity designated as "T.C. Investments, LLC" recognized and registered in the Office of

the Indiana Secretary of State on October 10, 2000. More telling yet, in terms of there being a genuine issue of material fact which goes to the heart of most of the counts of the complaint, is the Letter of Intent to Purchase, dated November 28, 2003, attached as part of Exhibit "CC" to the plaintiff's Exhibit 13 in response to the defendants' Statement. The first paragraph of this document identifies the "Buyer" as Thomas Cahillane, and not as any separate legal entity. The document is executed ambiguously by "TC Investments LLC Thomas J. Cahillane". Without belaboring the point, there is a genuine issue of material fact in this case – as clearly established by the record now before the court – as to whether transactions involving what the parties have designated as the "Mariposa Property" [the property subject to the Real Estate Contract attached as Exhibit "B" to the Affidavit of Thomas Cahillane] – involved a separate legal entity designated as "T.C. Investments, LLC" as recognized by, and registered with, the Office of the Secretary of State of Indiana – or Thomas Cahillane, adopting the assumed business name of "TC Investments, LLC" in relation to personal transactions. Many of the assertions of the defendants in their motion for summary judgment depend upon the interchangeability of entities designated as "T.C. Investments, LLC" and "TC Investments, LLC", an interchangeability which the record before the court establishes as a genuine issue of material fact not resolved – or resolvable – on the summary judgment record before the court. Because this issue is so critical to the assertions of the plaintiff and the defendants in this case, the record fails to support the defendants' assertions that there is no genuine issue of material fact with respect to certain of the issues in this case arising under the plaintiff's complaint, and that the defendants are entitled to judgment as a matter of law; Fed.R.Bankr.P. 7056/Fed.R.Civ.P. 56(c).

In their reply memorandum, the defendants seek to make short shrift of the materiality of the difference in the designations of "T.C. Investments, LLC" and "TC Investments, LLC". In part they contend that the plaintiff's assertions in this context are internally contradictory, an

assertion which has no merit; footnote 4, *supra.* It is also asserted that small matters of punctuation, in this case the use of a "." between "T'" and "C" and between "C" and "Investments" has no legal significance[5], and could be the subject of reformation to correct a scrivener's error. An action to reform a document is a separate legal proceeding under Indiana law, and that the defendants suggest its availability as a defense only emphasizes the fact that there is a genuine issue of material fact which gives rise to the need to suggest that remedy. The defendants advance an irrelevant argument that the conducting of business under an unregistered assumed business name is a matter for state prosecutors, and an argument which asserts that "TC Investments, LLC" is an assumed business name for "T.C. Investments, LLC", an assertion which has no support in the record for the purposes of the motion for summary judgment. Finally, the defendants' response points to "the deposition testimony of Cahillane, Schmaltz, Sparks and Nabhan" as conclusive refutation of the Trustee's assertions. Verily, these parties state in various ways that the operative entity for their deal was a limited liability corporation of some sort. But these statements don't overcome the issue of fact created by the Letter of Intent to Purchase, dated November 28, 2003, in which Cahillane personally is identified as the "Buyer" and in which an entity having no demonstrated separate legal existence is referenced. Finally, on page 11 of their reply memorandum, the defendants acknowledge that the Trustee has submitted evidence that Cahillane conducted business under the name of "TC Investments, LLC" prior to the incorporation of "T.C. Investments, LLC".

The bottom line is that the defendants take for granted in their submission that "T.C. Investments, LLC" is the same entity as "TC Investments, LLC". The record establishes that

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[5] Contrary to the defendants' assertions, relatively minor deviations in the names of entities have real significance under Indiana law; *See, e.g., Warner v. Young America Volunteer Fire Department*, Ind. App., 326 N.E.2d 831 (1975); *Minas Furniture Co. v. Edward C. Minas Co.*, Ind. App., 165 N.E. 84 (1929); *Hartzler v. Goshen Churn & Ladder Co.*, Ind. App., 104 N.E. 34 (1914).

there is no basis to determine – with respect to the defendants' motion for summary judgment – that entities designated as "T.C. Investments, LLC" and as "TC Investments, LLC" are one and the same. The principal problem with the defendants' motion in this context – and this brings us full circle back to the reason that summary judgments are disfavored here, because the same amount of effort concerning a summary judgment can yield a final determination at trial ,as contrasted to a waste of time – is that in a summary judgment context, the court cannot weigh evidence; the court cannot make final decisions based upon conflicting evidence; and the court must resolve all inferences in favor of the nonmoving party. Perhaps the defendants' assertions as to the equivalency of "TC Investments, LLC" and "T.C. Investments, LLC" will ultimately be borne out by a trial record, a record which will allow the court to weigh evidence and base determinations upon inferences derived from the evidence. However, the matter before the court does not involve a trial record. The genuine issue of whether transactions underlying certain theories of recovery advanced by the Trustee's complaint involved a separate legal entity designated as "T.C. Investments, LLC" or involved Thomas Cahillane utilizing the designation of "TC Investments, LLC" as the vehicle for personal transactions – permeates certain of the issues raised by the complaint and the defenses advanced by the defendants with respect to those issues. The record conclusively establishes that there is a genuine issue of material fact with respect to this genuine issue.

Other matters relating to material facts will be subsequently addressed.

## IV. Legal Analysis

### A. Count I of the Amended Complaint - Injunctive Relief

Count I of the amended complaint seeks injunctive relief pursuant to 11 U.S.C. § 105(a)[6], which states in pertinent part:

[6] Rhetorical paragraph 45 of the amended complaint states a request for injunctive relief pursuant to both § 105(a) and 11 U.S.C. § 541. Section 541 defines what is or is not property

> The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.

The court has inherent equitable powers, apart from 11 U.S.C. § 105(a), which allows it to enter injunctions in appropriate circumstances; *See*, *Marrama v. Citizens Bank of Massachusetts*, 127 S.Ct. 1105 (2007). In cases involving alleged transfers of property, a bankruptcy court clearly has the authority, in appropriate cases, to enter an injunction precluding further transfer of that property until issues regarding the avoidance of transfers have been resolved; 11 U.S.C. 105(a).

If the court were to determine that the Chapter 7 bankruptcy estate has interests in either an entity which owns or controls interests in the Mariposa property; has interests in that property directly through the debtor; can establish that the debtor's interests in that property were to some extent transferred in a manner avoidable under 11 U.S.C. § 548; or can prove that the interests of a corporate entity and those of the debtor were so intermingled that some form of piercing a corporate entity's corporate veil could be established – then, upon an appropriate demonstration from the plaintiff, the court could well enter an injunction prohibiting actions which would divest the bankruptcy estate of its interests or lessen the value of those interests.[7]

The focus of inquiry at this point in the case is not whether the plaintiff has established the elements necessary for it to obtain injunctive relief. Rather, at this juncture the focal inquiry is whether or not the plaintiff might succeed on injunctive relief under any set of circumstances relating to claims which may or will survive the defendants' motion for summary judgment. In

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of a bankruptcy estate, and the court assumes the reference to that section in rhetorical paragraph 45 is essentially an assertion that the bankruptcy estate of Thomas Cahillane has property interests in either T.C. Investments LLC; TC Investments, LLC; or directly in the "Mariposa Property" which require preservation by means of an injunction.

[7] No affirmative steps have been taken by the plaintiff to seek interim injunctive relief.

other words, at this stage, the defendants must establish that there is absolutely no prospect that the plaintiff could establish an underlying claim which could result in the imposition of an injunction to protect the bankruptcy estate's interests in property or avoidable transfers. On the basis of this record, the court determines that the defendants have failed to sustain their burden with respect to their requested summary judgment on Count I of the amended complaint.

The court determines that there are genuine issues of material fact as to the potential entitlement of the plaintiff to injunctive relief, and that the defendant's motion for summary judgment with respect to Count I must be denied.

B. Count II of the Amended Complaint

In Count II of the amended complaint, the Trustee seeks a declaratory judgment as to property interests of the bankruptcy estate in, variously, the following entities:

1. TC Investments, LLC;

2. T.C. Investments, LLC;

3. The Mariposa Property, as either an asset owned by a corporate entity of which Thomas Cahillane is alleged to be a member or as an asset in which Thomas Cahillane still has a direct interest apart from the intervention of any corporate owner; and

4. Recovery on actions for avoidance of a transfer of a property interest by the debtor or piercing the corporate veil of a corporate entity in which the Mariposa Property may be held.

The factual issues relating to the identity of the "entity" involved in the Mariposa transaction have been set out in Section III above.

The bottom line is that, resolving all inferences in favor of the Trustee, there is evidence in this record that creates a genuine issue of material fact as to whether the contract for purchase of the Mariposa Property was entered into by Thomas Cahillane individually or by an entity designated as TC Investments, LLC as an alter ego of Thomas Cahillane. Count II of the

amended complaint essentially seeks a determination of the Chapter 7 bankruptcy estate's interests in the interests of whatever entity, or individual, is determined to be the holder of rights in the Mariposa Property. That issue is the crux of the amended complaint, and of most of the counts which it asserts. In order to succeed on the motion for summary judgment with respect to Count II, the defendants must demonstrate that, based upon the record before the court, the plaintiff cannot establish, or has entirely failed to point to any evidence that establishes, that the Chapter 7 bankruptcy estate of Thomas Cahillane has any interests in any entities', or individuals', interests in the Mariposa Property. As stated above, the record does not support summary judgment on Count II for the defendants.

The court finds that there are genuine issues of material fact with respect to the relief requested by Count II of the amended complaint, and that the defendants' motion for summary judgment on Count II must be denied.

C. Count III of the Amended Complaint

In Count III, the Trustee seeks to pierce the corporate veil of whatever corporate entity may have interests in the Mariposa property, contending that the interests of the debtor and of that corporate entity have been so intermingled and subverted that the corporate entity should be held to be liable for the debts of the debtor and its property interests deemed to be interests of the Chapter 7 bankruptcy estate of Thomas J. Cahillane for the benefit of his creditors.

The alternative theory advanced in Count III of the amended complaint depends upon the court's determining that a corporate entity has interests in the Mariposa property. As stated previously with respect to Count II, in order to succeed on their motion for summary judgment, the defendants are required to establish that the Trustee has presented no evidence in the record, or any reasonable inferences from evidence in the record, from which the court could determine that the affairs and business interests of the debtor Thomas Cahillane were so intermingled with the affairs and business interests of a corporate entity that Thomas Cahillane

and the corporate entity should be deemed to the same entity for purposes of determining property of the Chapter 7 bankruptcy estate and claims of creditors against that property. If the court should determine that no corporate entity has interests in the Mariposa property – a conclusion which, as noted above, is not precluded by the record before the court – then Count III is moot. If the court should determine that interests in the Mariposa property are held by a corporate entity, then Count III becomes a potential consideration. At this juncture, because interests in the Mariposa property cannot be determined to not be those of a corporate entity, the court cannot yet reach issues raised by Count III. If the court were to determine that interests in the Mariposa property were held by a corporate entity, the record in this case provides sufficient evidence for the plaintiff to go forward with the theory that the interests of Thomas J. Cahillane and of that corporate entity were sufficiently intermingled, or dealt with, in a manner which might give rise to a viable claim for piercing of the corporate veil of the corporate entity. The record makes clear that prior to the formal establishment of T.C. Investments, LLC, Thomas Cahillane conducted business affairs under the alternative name of TC Investments, LLC. The contract for purchase of the Mariposa property was entered into not with T.C. Investments, LLC, but rather with an entity designated as TC Investments, LLC, or with Cahillane himself, who is designated as the "buyer" in that contract.

The court determines that the record is sufficient for the plaintiff to proceed on Count III if the court determines that interests in the Mariposa property are held by a corporate entity.

The court thus determines that there is a genuine issue of material fact as to whether or not the plaintiff can establish a claim under Count III of the amended complaint, an issue which depends upon determination of the entity or individual holding interests in the Mariposa property. The defendants' motion for summary judgment with respect to Count III must therefore be denied.

D. Count IV of the Amended Complaint

In Count IV of the amended complaint, the Trustee seeks the appointment of a receiver to protect the Chapter 7 bankruptcy estate's interests in the Mariposa property. According to the record, the Mariposa property remains in the control and ownership of whatever entity acquired it previously, and that it is an unimproved parcel of raw land. The court deems Count IV of the Trustee's amended complaint to be an alternative to Count I. If the Trustee succeeds on Count I, the injunction thereby obtained will provide the plaintiff with the relief requested by Count IV, in that no interests of the Chapter 7 bankruptcy estate can be compromised in any transaction involving transfer of any interests in the Mariposa property. Again, the Trustee has not actively pursued interim relief with respect to Count IV. The premise for Count IV, as stated in rhetorical paragraph 16 of the amended complaint, is 11 U.S.C. § 105(a), a provision which the court does not deem to authorize the appointment of a receiver under the circumstances of this case, in light of the relief requested by Count I. Moreover, the record has no evidence which even suggests that there are any matters which require administration through a receiver, e.g., rents, leases, etc.

The court views Count IV as a "throw in" count essentially duplicative of the relief requested by Count I, and as such, it is unnecessary to complicate this case with the continued existence of Count IV.

The court determines that in light of Count I, Count IV of the amended complaint is redundant and is unnecessary in order for the plaintiff to obtain any relief within the scope of the amended complaint. The court determines that the defendants' motion for summary judgment with respect to Count IV should be granted.

E. Counts V and VI of the Amended Complaint

In Count V, the Trustee contends that Cahillane transferred interests in property to Sparks which are avoidable pursuant to 11 U.S.C. § 548. In Count VI, worded nearly identically

to Count V, the Trustee asserts that Cahillane transferred interests in property to Nabhan which are avoidable under 11 U.S.C. § 548.

In order to determine whether or not either of these counts has any viability, it is first necessary to determine what, if any, interests were transferred by Cahillane to whom and under what circumstances. If TC Investments, LLC is deemed to be a corporate entity and if it is determined that TC Investments, LLC as a corporate entity was the purchaser of the Mariposa property and is the owner of the Mariposa property, then we have one case which revolves around the interests in that corporate entity which were transferred by Cahillane to Sparks or Nabhan, and whether Cahillane received "reasonably equivalent value" as defined by 11 U.S.C. § 548(a)(1)(B)(I) with respect to that transfer. If interests in the Mariposa property were never transferred into a corporate entity, then we have a horse of another color, again involving the nature of the interests transferred by Cahillane to Nabhan and Sparks and whether or not the transfer of those interests is avoidable under § 548 of the Bankruptcy Code. Once again, before Counts V and VI can be determined, the arena in which the gladiators must fight each other must be established: are we dealing with a transfer by Cahillane of a membership interest in a corporate entity; are we dealing with a transfer by Cahillane of a direct property interest in a contract for purchase of real estate; or are we dealing with something else?

One thing is clear. The defendants have rigged their snowfences to principally address one theory with respect to seeking to obtain judgment on Counts V and VI: that the contract for purchase of interests in the Mariposa property had expired by its own terms, and that any transfer of interests by Cahillane was valueless as a result. The record establishes inferences to the contrary. The record establishes that the Letter of Intent to Purchase dated November 28, 2003, signed by Thomas Cahillane on a signature line designated as "TC Investments LLC Thomas J. Cahillane" , designated Thomas Cahillane as the buyer. On page 44, lines 1-4, of the deposition of Paul Arthur Stitt taken on May 2, 2007, Mr. Stitt stated that only one written

offer to purchase the property was received, and that it was received from “Tom Cahillane”.

The real estate contract itself, while designating TC Investments LLC as the buyer, does in fact state in paragraph 24 the following:

> This Agreement will become null and void and have no further force and effect whatsoever in law or equity if this Agreement has not been previously terminated or the transaction contemplated by the Agreement closed by October 26, 2003.

However, a Second Amendment to Purchase Agreement dated November 19, 2003 certainly creates an inference, supported by admissible evidence, that the parties to the original contract waived the termination provision, acknowledged and agreed that the original contract remained in effect, and that it was never in fact voided. An additional inference is supplied by the fact that the record establishes the transaction contemplated by the original contract was consummated, and a closing was held by which title to that property was transferred purportedly in accordance with the terms of the original contract. Thus, while perhaps having been voidable by paragraph 24, there are inferences in the record sufficient to give rise to proof that the contract remained in effect as between the original parties, and that it had whatever value the original contract had as a result.

To reiterate, the original contract for purchase of the Mariposa property designed the purchaser as TC Investments, LLC. It was signed by Paul Stitt, “Pres” on April 3, 2003[8], and by Thomas J. Cahillane, for “TC Investments, LLC” on a signature line stating “Thomas Cahillane, its Member” on April 4, 2003. Despite paragraph 24's statement of automatic invalidity, the contract was modified subsequent to the stated date of voiding.

The defendants’ argument is exclusively based upon the premise that the contract had no value because it was void, a position which the record will not sustain in view of the fact that

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[8] The seller in the contract is designated as an individual, so why Paul Stitt included the designation of “Pres” is unknown.

the contract was modified subsequently to its voiding date and the transaction described in the contract was carried out by its apparent original parties.[9]

In support of their contention that any rights in the contract for purchase of the Mariposa property were valueless when any transfer of those rights was undertaken by Cahillane, the defendants rely on cases which have no applicability to this case. In *Murphy v. Robinson*, 82 B.R. 661 (Bankr. D. Mass. 1988), the facts of the case clearly establish that a contract for purchase expired by its terms and was deemed void, and that a purchasing party other than the one to the original contract completed the transaction. In the instant case, the original parties to the original contract may have remained parties in the consummated transaction. Thus, any statement by a bankruptcy court in the State of Massachusetts as to the effect of a voiding clause in a contract has no applicability here, where the record indicates the parties may well have waived the time limitations by which the contract would have been avoided. The defendants also cite *Licocci v. Cardinal Associates, Inc.*, Ind. App., 492 N.E.2d 48 (1986) for the proposition that "a party first guilty of a material contract breach cannot maintain a specific performance action against the other party". Again, the record establishes that the transaction contemplated by the purportedly valueless contract was in fact consummated; that no one declared a breach of the original contract; and that the amended contract may have carried over the continued viability of the first contract.

The record establishes that either an entity of which Thomas Cahillane was the sole member, or Thomas Cahillane individually, entered into a contract to purchase a parcel of real estate for a stated sum. The transaction addressed by that contract was consummated, and

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[9] To add to the confusion in this record as to who is on first, who is on second, who may have advanced to third, and who scored – the original contract as stated described the seller as Paul Stitt individually, and but was executed by Paul Stitt in some apparent representative capacity. The Second Amendment to Purchase Agreement described the seller as "Mariposa of Indiana, Inc., and was signed by Barbara R. Stitt as president of that corporation and Paul A. Statt as chairman of that corporation.

the Mariposa property was possibly purchased pursuant to its terms, as modified. Between the date of the original contract and its consummation, transactions occurred in which Thomas Cahillane transferred either his individual interests, or his membership interests in a corporate entity, to Sparks and Nabhan.

The defendants are correct in asserting that the transfer involved interests in a contract, rather than ownership interests in real estate. However, it is a question not answered by the record at this time as to whether or not the value received by Cahillane for transfer of whatever he transferred was equivalent to the value of what he transferred. Again, in order to succeed on their motion, the defendants must establish that there is nothing in the record by which the plaintiff can succeed on its § 548 claim against either Sparks or Nabhan. The record is clear in that Nabhan provided no value for whatever interests he acquired, from whomever he acquired them. It is clear that Sparks provided cash used in the purchase transaction, but whether that cash was "reasonably equivalent value" with respect to whatever interests he may have acquired cannot be determined from this record.

The court determines that the defendants have failed to establish that there is no genuine issue as to any material fact as to Counts V and VI of the amended complaint, and that the defendants' motion for summary judgment with respect to those counts should be denied.

F. Counts VII and VIII of the Amended Complaint

Counts VII and VIII of the amended complaint seek to avoid transfers pursuant to 11 U.S.C. § 547(b). Count VII asserts transfer avoidance claims against Nabhan, while Count VIII asserts claims on the same theory against Sparks.

In order to successfully oppose the defendants' summary judgment motion, the plaintiff must establish evidentiary support in the record with respect to each of the five elements of a cause of action under § 547(b), which states as follows:

**(b)** Except as provided in subsections (c) and (I) of this section,

> the trustee may avoid any transfer of an interest of the debtor in property–
>
> **(1)** to or for the benefit of a creditor;
>
> **(2)** for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> **(3)** made while the debtor was insolvent;
>
> **(4)** made–
>
> > **(A)** on or within 90 days before the date of the filing of the petition; or
> >
> > **(B)** between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> **(5)** that enables such creditor to receive more than such creditor would receive if–
>
> > **(A)** the case were a case under chapter 7 of this title;
> >
> > **(B)** the transfer had not been made; and
> >
> > **(C)** such creditor received payment of such debt to the extent provided by the provisions of this title.

The critical elements upon which the court will focus are those of § 547(b)(1) and (2), the former of which requires a "transfer of an interest of the debtor in property . . . to or for the benefit of a creditor" (emphasis supplied), and the latter of which requires that the transfer to or for the benefit of a creditor be "for or on account of an antecedent debt owed by the debtor before such transfer was made". With respect to the circumstances of this adversary proceeding, the term "creditor" is defined by 11 U.S.C. § 101(10)(A) to mean an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor". As defined by 11 U.S.C. § 101(12), the term "debt" means "liability on a claim". The term "claim" with respect to the circumstances of this case means a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured,

unmatured, disputed, undisputed, legal, equitable, secured or unsecured"; 11 U.S.C. § 101(5). In his memorandum in response to the defendant's motion for summary judgment, the Trustee asserts that the record establishes that Cahillane "transferred the sums of $11,270.00, $100.00, $125.00, and $100.00 to or for the benefit of Sparks and Nabhan on account of Cahillane's alleged obligations under the Disputed Operating Agreement". In support of this assertion, the Trustee refers to exhibits 13(Q), (R), (S), (T) and (U) as evidence of transfers made by Cahillane to or for the benefit of either Sparks or Nabhan as his creditors. Exhibit 13(Q) is comprised of copies of four checks, each apparently drawn on the account of an entity known as New Silicone Technologies, Inc.; none of these checks are payable to either Sparks or Nabhan. Exhibit 13(R) is an invoice from Town and Country Construction to an entity designated as "Natural Ovens Bakery" in the total amount of $28,552.00. A handwritten notation on this exhibit states: "Paid in Full", "8/27/04", "CH 5147 $11,270.00". This amount correlates to check number 5147 attached to exhibit 13(Q), the payee of which is Natural Ovens. Exhibit 13(S) is an invoice from MJB Lawncare, Inc., billed to Tom Cahillane for lawn maintenance in the amount of $100.00. Exhibit 13(T) is another invoice from MJB Lawncare, Inc. to Tom Cahillane in the amount of $125.00 for lawn maintenance. Exhibit 13(U) is yet another invoice from MJB Lawncare, Inc. to Tom Cahillane for lawn maintenance in the amount of $100.00. The foregoing documents do not establish that either Nabhan or Sparks was a creditor of Cahillane's with respect to any transaction to which any of these payments relate. These documents do not even create an inference that Cahillane himself made any payments, the four checks comprising exhibit 13(Q) having been drawn on the account of New Silicone Technologies, Inc.

In paragraph 31 of the Affidavit of Thomas Cahillane (which constitutes a part of the defendants' submission in support of their summary judgment motion), the statement is made that Cahillane "advanced some funds to pay TCI's expenses, but I was always reimbursed

those funds by either Sparks or Nabhan, as they were the members ultimately responsible for any expenses of TCI". In paragraph 16 of the Affidavit of Ronald Nabhan (also a part of the defendants' summary judgment submission), the statement is made that "(s)ince December 30, 2003, Sparks and I have been ultimately responsible for all expenses of TCI, which include lawn maintenance, property taxes, legal expenses and other miscellaneous expenses". In paragraph 15 of the Affidavit of Charles R. Sparks (also a portion of the summary judgment record), an identical statement to that made in paragraph 16 of the Nabhan affidavit is made. To the extent any inferences may be drawn from this record, the inferences are that Cahillane advanced monies for payment of expenses for which Nabhan and Sparks were responsible. That circumstance does not cause Nabhan or Sparks to be a creditor of Cahillane, but rather to be debtors with respect to Cahillane.

Perhaps the Trustee's theory is that there is some inference somewhere in this record that the payments evidenced by exhibits 13(Q)-(U) were made by Cahillane to third parties in order to satisfy some indebtedness somehow owed by him to Sparks or Nabhan. The materials to which the Trustee has pointed in support of his opposition to the defendants' motion for summary judgment on Counts VII and VIII do not begin to establish any such inference. As stated in *Celetox, supra.*, once challenged by a summary judgment motion, it is the responsibility of the Trustee to establish elements of his cause of action to give rise to a genuine issue of material fact on all five elements of 11 U.S.C. § 547(b). The Trustee has failed to sustain this burden.

The court finds that there is no genuine issue of material fact with respect to Counts VII and VIII of the amended complaint, and that the defendants are entitled to summary judgment on those counts as a matter of law.

G. Counts IX and X of the Amended Complaint

In Count IX of the amended complaint, the Trustee asserts that Nabhan owed fiduciary

duties to Cahillane (with respect to alleged membership in T.C.I. Investments, Inc.) and that Nabhan breached these duties. Count X asserts identical claims against Sparks.

The premise of these claims by the Trustee is that Nabhan, Sparks and Cahillane were members of a corporation which held an asset of value; that by taking certain actions in that corporation with respect to that asset, Sparks and Nabhan breached fiduciary duties owed to Cahillane; that the breach of those fiduciary duties caused damage to Cahillane; and that the Trustee has now acceded to the position of Cahillane with respect to an action to recover these damages.

There are two critical issues with respect to the legal theories advanced by Counts IX and X. The first is the status of Cahillane in a corporation in which he may have been involved with Nabhan and Sparks. The defendants vigorously oppose the assertion that Cahillane was a member in any such corporation, contending that by virtue of a written operating agreement signed by Cahillane as "manager" and by Sparks and Nabhan separately as a "member", Cahillane was a manager with respect to whatever entity that agreement related to, and as a manager was not a person to whom either Sparks or Nabhan owed fiduciary duties.[10] The second is the identity of the operating agreement at issue, to be used as base for determining Cahillane's status.

The Trustee appears to contend that inferences in the record are sufficient to raise a question as to the existence and effectiveness of another operating agreement, attached as exhibit "A" to the amended complaint. The court first notes that this document references Cahillane as the only member, and it isn't signed by anyone, even by Cahillane. In order to successfully oppose a motion for summary judgment in the circumstances of this case, it is the

[10] The "operating agreement of TC Investments, LLC" upon which the defendants rely is attached as an exhibit to affidavits of Nabhan, Sparks, Cahillane, Peggy Lawhead, and John A. Schmaltz, and is therefore a part of the evidentiary record submitted by the defendants in support of their motion for summary judgment.

plaintiff's burden to establish that there is an inference or inferences based upon concrete evidence in the record sufficient to in essence establish the plaintiff's burden of production with respect to each element of a cause of action asserted in the complaint. There is no concrete evidence upon which to base any inference that with respect to the entity designated as TC Investments, LLC, Cahillane was a member contemporaneously with the duration of membership of Sparks and Nabhan in that entity. On page 36 of the Trustee's memorandum in response to the motion for summary judgment, the statement is made that "the TCL Articles expressly provide that any manager is a member of TCL and Cahillane has been a member of TCL, to the extent that it exists, since October 10, 2000. Thus Cahillane is a member of TCL." The articles of TCL to which reference is apparently made are those attached as exhibit "F" to the Trustee's response to the defendants' motion for summary judgment. This document is a single page, and the court has read it and re-read it and is unable to find any statement that a manager is a member of that entity. Article IV of the Articles of Organization of T.C. Investments LLC states the following: "The Company is to be managed by all of its members . . .", and the word "manager" does not appear anywhere in that section. Without question – and without citation to authority because all parties in this action concur with this principle – Indiana law provides that each member of an LLC owes a fiduciary duty to each other member to act in a manner which does not unreasonably, illegally, or arbitrarily adversary affect the interests of a member in the entity. In order to assert a viable theory of recovery on the premise of beach of fiduciary duty by Nabhan and Sparks, the Trustee must establish that Cahillane was in fact a member of some corporate entity of which they were members as well. There is no evidence in this record which supports a reasonable inference that Cahillane was a member of TC Investments, LLC (whatever it is/was) at a time when Sparks and Nabhan were also members of that entity. There is no concrete evidence in this record upon which any reasonable inference can be derived that the "Operating Agreement of TC Investments, LLC"

attached as exhibit "A" to the Trustee's amended complaint ever had any effective legal existence. Moreover, there is an issue raised in this record as to whether the entity consistently described by the defendants as "TC Investments, LLC" is even a corporation at all, given that the only corporate entity which the record demonstrates uses the combination of letters in that entity's name is "T.C. Investments, LLC"

In short, in order to avoid a summary judgment for the defendants on Counts IX and X, there must be evidence in the record which satisfies the Trustee's burden of production of evidence on each of the elements necessary to sustain those counts. The court determines that there is no concrete evidence, or reasonable inferences drawn from evidence, which establishes that Cahillane was a member of any entity contemporaneously with the membership of Sparks and Nabhan in that entity, or which otherwise establishes that Sparks or Nabhan had any form of fiduciary duty to Cahillane with respect to the entity designated as T.C. Investments, LLC.

Even assuming hypothetically that Sparks and Nabhan owed some form of fiduciary duty to Cahillane with respect to TC Investments, LLC (whatever it is/was), the four alleged breaches of those duties, stated on page 37 of the Trustee's memorandum in response to the defendants' motion for summary judgment, would not sustain the plaintiff's claims in Counts IX and X. The four alleged instances of breach of fiduciary duty are the following:

a. Actively attempting with Cahillane to modify and terminate the Cahillane Bankruptcy Estate's interests in TCL and the Mariposa Property; Appendix Exh 13(RR);
b. Entering into Agreements with Cahillane post-Petition Date without notice to, or the consent of the Trustee; Appendix Exh. 14(F), (G); Appendix Exh. 3, para. 9;
c. Entering into Sale Contracts without notice to, or the consent of the Trustee; Appendix Exh. 14, pages 207 through 209; Appendix Exh. 3, para. 9; and
d. Objecting to the engagement of an independent broker to properly market the Mariposa Property for sale; Appendix Exh. 3(F);

The averments of Counts IX and X, and the materials submitted by the Trustee in support of those averments in response to the defendants' motion for summary judgment, speak very generally and nebulously with respect to the concept of a "fiduciary duty". The Trustee has provided no legal authority which delineates any particular duty alleged by the Trustee to have been breached by Nabhan and Sparks.

The first asserted breach of fiduciary duty is an asserted attempt by Sparks and Nabhan, in association with Cahillane, to affect the Cahillane bankruptcy estate's interests in TCL and the Mariposa Property. The evidence pointed to by the Trustee in support of this proposition is exhibit 13(RR), a document dated January 6, 2006 by which Cahillane acknowledged his receipt of $10,000.00 from Nabhan and Sparks "for full payment of a certain Promissory note Dated 12-31-03". The court is at a loss to understand the Trustee's theory. Moreover, the Trustee's theory in Counts IX and X is that Sparks and Nabhan have breached duties owed to Cahillane, a concept impossible to sustain when it is asserted by the Trustee that Cahillane, Sparks and Nabhan undertook the same acts together.[11]

The contention that Nabhan, Sparks and Cahillane together breached a fiduciary duty owed to Cahillane is the fatal flaw in the second asserted fiduciary duty breach, and it fails for the same reasons as does the first.

The third asserted breach – entering into sales contracts without notice to, or consent of, the Trustee – is again not a breach of a fiduciary duty owed by Sparks or Nabhan to

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[11] Perhaps the first asserted breach of fiduciary duty is more in the nature of an alleged conspiracy among Nabhan, Sparks and Cahillane to adversely affect the Chapter 7 bankruptcy estate. That contention, however, does not arise under the theories advanced in Counts IX and X. Even if one were to extrapolate the Trustee's theory to encompass the contention that Nabhan and Sparks, in concert with Cahillane, breached a duty owed to creditors of Cahillane's bankruptcy estate, that argument would require as a foundation that a corporate entity had creditors independently of piercing a corporate veil to cause them to be so. There is no evidence that TCL had or has creditors which might be included in those affected by Cahillane's bankruptcy case.

Cahillane. Again, the Trustee appears to attempt to assert that Sparks and Nabhan, in conjunction with Cahillane, or independently of him, have taken actions which have adversely affected the bankruptcy estate itself and its interests in property asserted to be that of Cahillane subject to administration by the Trustee. It is not up to the court to make the plaintiff's case, and the plaintiff has so jumbled its contentions in Counts IX and X that a clear path to the plaintiff's theories on those counts cannot be ascertained. Moreover, the assertion in the context of the third alleged breach of fiduciary duty is that the entry into contracts breached a duty. The plaintiff has failed to provide the court with any authority that the mere entering into a contract, without an allegation of damages sustained or consequences suffered, constitutes an actionable claim for breach of fiduciary duty: the record in this case establishes that nothing has been done with respect to the contracts alleged by the Trustee to have been entered into.

The court deems the fourth asserted breach of fiduciary duty to be totally frivolous. How merely objecting to a proposed sales mechanism for the Mariposa property results in a breach of some form of fiduciary duty is beyond the court's ken.

Finally, if the court were to find that the property interests actually at issue in all of this were never placed within a corporation, the Trustee's contentions in Counts IX and X would be moot.

For the foregoing reasons, the court determines that there is no genuine issue as to any material fact with respect to the claims asserted by the Trustee in Counts IX and X, and that the defendants are entitled to judgment as a matter of law with respect to those counts.

### H. The Defendant's Motion to Reject Executory Contract or in the Alternative to Lift the Automatic Stay

On February 16, 2007, the defendants filed a Motion to Reject Executory Contract or in the Alternative Lift of Automatic Stay. This motion requested the following relief:

> WHEREFORE, Charles R. Sparks and Ronald Nabhan seek the rejection of the executory contract Operating Agreement or in the

> alternative a lift of the automatic stay to amend the Operating Agreement so as to remove Thomas Cahillane as manager of TC LLC; to revise the compensation owed to Thomas Cahillane to correspond to the terms previously agreed to by the parties based off of the Prospectus; to file the necessary forms with the Indiana Secretary of State to reinstate TC LLC as a limited liability company in good standing; to file the necessary forms with the Indiana Secretary of State to amend the Articles of Organization accordingly; to proceed with a purchase and sale transaction between of the Mariposa Property; to return the $682,246.00 wired by Charles Sparks back to Charles Sparks from any sale proceeds of the Mariposa Property and to place the remaining balance of the proceeds from the sale of the Mariposa Property in a court approved investment account until this Court issues a final order in the Adversary Proceeding related to movants and the Mariposa Property.

The contested matters arising from this motion were consolidated into adversary proceeding 05-6144 by the court's order entered on March 23, 2007.

The focus of the motion is a document entitled "Operating Agreement of TC Investments, LLC", stated on its face to have been entered into on December 30, 2003 among Thomas J. Cahillane, as "manager"; Charles R. Sparks, as "member" and Ronald Nabhan, as "member" [the document appears in several locations in the record; the citation of it as exhibit "G" attached to the affidavit of Thomas Cahillane will suffice to identify it]. The defendants contend that the agreement should either be determined to have been rejected by the Chapter 7 Trustee or not capable of assumption by the Chapter 7 Trustee. The Trustee of course opposes these assertions. The alternative portion of the motion which seeks relief from the automatic stay in part seeks to modify the Operating Agreement, in part seeks to obtain various forms of relief from the automatic stay in relation to other matters relating to the Mariposa Property, and in part seeks to proceed with certain matters with respect to the entity designated as TC Investments, LLC.

Focusing first on the motion's request concerning rejection of the Operating Agreement as an executory contract, the obvious threshold issue to be addressed is whether or not the

agreement is an "executory contract" within the meaning of 11 U.S.C. § 365. The contract which is the subject of analysis is that identified as the foregoing exhibit: it is not that contract as proposed to be modified by the defendants, and it is not the alternative "Operating Agreement" attached as exhibit "A" to the Trustee's amended complaint.

11 U.S.C. § 365 does not define the concept of "executory contract". This term has been defined by the United States Court of Appeals for the Seventh Circuit in *In re Streets & Beard Farm Partnership*, 882 F.2d 233, 235 (7th Cir. 1989) as follows:

> The Bankruptcy Code does not contain a precise definition of the term executory contract. The legislative history to § 365, however, provides that an executory contract is a contract on which performance remains due to some extent on both sides. S.Rep. No. 989, 95th Cong., 2d Sess. 58 and H.Rep. No. 595, 95th Cong., 1st Sess. 347, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5844, 5963, 6303. Taken literally, this definition would render almost all agreements executory since it is the rare agreement that does not involve unperformed obligations on either side. In our view, however, this interpretation would not effect the intent of Congress. Rather, we believe that Congress intended § 365 to apply to contracts where significant unperformed obligations remain on both sides. *See* V. Countryman, *Executory Contracts in Bankruptcy:* Part I, 57 Minn.L.Rev. 439, 460 (1974) (Defining an executory contract as an agreement where "the obligation of both the bankrupt and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other."). In determining the significance of the remaining obligations under a contract we look to relevant state law, in this case the law of Illinois. *See Butner v. United States,* 440 U.S. 48, 54, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979) ("[D]etermination of property rights in assets of a bankrupt's estate left to state law.").

In terms of analysis as executory contracts, operating agreements of limited liability corporations follow the same rules as do other contracts. As stated in *In re Tsiaoushis*, 383 B.R. 616, 620 (Bankr. E.D.Va. 2007):

> The analysis used to determine whether a particular limited liability company operating agreement is an executory contract under Bankruptcy Code § 365(e)(1) is clear. There is no *per se* rule. Each operating agreement is separately analyzed. The

> courts, utilizing the Countryman definition, examine the operating agreement to determine whether there are unperformed obligations on the part of the parties. If not, the operating agreement is not an executory contract. *Garrison-Ashburn; Capital Acquisitions; Fiesta.* If there are unperformed obligations of both the debtor and the other party or parties, the court must determine whether, if not performed, non-performance would constitute a material breach excusing the other party from further performance. If so, the operating agreement is an executory contract.

The Operating Agreement in this case states the following matters in relation to obligations imposed upon the manager *vis-a-vis* the members:

1. Article 2, Section 2.1 states:

> Section 2.1 Consideration for Membership Interest: Capital. The Manager will cause the Company to issue ownership (Membership) interests of the Company in the percentages described on Exhibit A hereto which is made a part hereof for such capital contributions as are agreed by the parties hereto and described on Exhibit A.

2. Article 2, Section 2.6 states:

> Section 2.6. Distributions. Cash distributions made from time to time shall be allocated in accordance with Section 2.4, above. The Company*s Manager designated pursuant to Article 5 hereof shall determine after consultation with the Members when and what portion of cash funds of the Company shall be distributed to Members. Notwithstanding the foregoing, the Manager shall be required to distribute annually to the Members an amount equal to or greater than the highest aggregate amount of federal and state income taxes payable by any Member resulting from such Member*s participation to the Company. At the time of any distribution, however, the Company must have available to it unencumbered and uncommitted cash funds sufficient for such distribution after taking into account the amounts which should be set aside to provide a reasonable reserve for the continuing conduct of the business of the Company and for normal working capital.

3. Article 5, which states in its entirety:

## ARTICLE 5

### Management

Section 5.1 Management. The Company will be managed by Thomas J. Cahillane. The Manager may delegate all or a portion of management responsibilities.

Section 5.2 Election and Qualification. One or more Managers may be elected from time to time by the Members. The number of Managers may be fixed or changed from time to time by the Members. A Manager need not be a Member of the Company. The Manager of the Company may be removed, replaced, or the authority to manage the Company may be placed in the Members at any time, with or without cause, by a majority vote of the interests of the Company.

Section 5.3 Powers of the Manager. A Manager shall exercise all the powers of the Company, subject to the restrictions imposed by law, by the Articles of Organization, or by this Agreement. A Manager is authorized and empowered to determine all questions relating to the day-to-day conduct and management of the Company business, and the determination of the Manager on any such questions, absent manifest error, shall be binding on all Members and the Company.

Section 5.4 Compensation. would represent the equity value of 1/6, or 1/6 of the total value of the Company;

In addition, the Company shall pay the Manager compensation in an amount equal to $50,000.00 for acquisition costs and improvement costs incurred by the Company in its business of real estate development. Manager will also receive a compensation amount which ~~is the equivalent~~ of 3 shares only when the property is sold for the minimum $6.00 sq. ft. Manager will only receive the fees listed here when the property is sold for the minimum $6.00 sq. ft. Such compensation shall be based upon the gross purchase price paid by the Company in the case of real estate acquired by it, and upon final improvement project costs as determined by the Members, including but not limited to architectural, design, engineering, accounting and legal fees, expenses of environmental testing, landscaping and berming, insurance and bonding fees, and all building and infrastructure construction costs. Compensation due the Manager in connection with real estate acquisition shall be paid at the closing of the Company's purchase of such real estate. Compensation payable to the Manager in connection with the construction of improvements shall be paid upon substantial completion of the project or increments thereof. For purposes of this Section, the property will be "sold" when fee simple title is transferred to any person or when any portion of the property is leased for any person. The "purchase price" shall include the value of all rents and fees paid in connection with the property.

Section 5.5 Other Business and Investment Opportunities. A Manager may have other business interests and may engage in other activities in addition to those relating to the Company, including acting as an individual or a principal for other

relating to the Company, including acting as an individual or a principal for other entities which transact the identical business as the Company. Neither the Company nor any Manager or Members will have any right by virtue of this Agreement or the relationship created hereby in or to such activities or to the income or proceeds derived therefrom, and the pursuit of such activities will not have been deemed wrongful or improper.

Section 5.6. Special Provisions for Manager Serving as Real Estate Agent. The Manager shall receive additional compensation for his services from time to time as real estate agent in connection with the sale of any improved or unimproved real estate sold by or on behalf of the Company. In such event the Manager shall receive a real estate commission equal to ~~five percent (5%)~~ ZERO PERCENT (0%) of the purchase price of such real estate sold, which shall be in addition to any other commissions paid to any other brokers as the result of such sale. Such compensation shall be due upon the sale of the real estate.

4. Article 6 provides for indemnification of the Manager and Members under certain designated circumstances.

The initial question is whether any of the obligations encompassed within the foregoing provisions were unperformed on both sides. The Trustee argues that all that remains with respect to management of the sole asset of TC Investments, LLC is to hire a broker to sell the property. The Trustee therefore argues that the Operating Agreement is not an executory contract. The defendants contend to the contrary.

It must first be noted that the identity of the parties in relation to the Operating Agreement is not established by this record. As the court has noted previously in this memorandum of decision, the document refers to an entity designated as "TC Investments, LLC", and there is no limited liability corporation in Indiana under that name. If the parties to the Operating Agreement intended it to apply to the entity designated as "T.C. Investments, LLC", then the analysis of its terms would proceed with respect to matters relating to that entity. However, if the parties intended the Operating Agreement to be essentially a contract among Sparks, Nabhan and Cahillane, the latter doing business as "TC Investments, LLC", then the

executory contract analysis proceeds in relation to those persons. Regardless of the context, the executory contract analysis is the same.

Whether involving a corporate entity, or merely a contract among three individuals, the focus of the agreement was the Mariposa property. Management of interests in that property necessarily included dealing with real property taxes, provision of insurance, making certain that the property conformed to the requirements of local ordinances (including the maintenance of the property in accordance with mowing laws and other ordinances applicable to vacant land), dealing with any emergencies which might arise in relation to the property, and a myriad of things that are involved in the ownership of a rather large tract of vacant land in the middle of an essentially urban area. The fact that Section 5.1 of Article 5 of the Operating Agreement provides that the Manager may delegate all or any part of his management responsibilities does not obviate the Manager's responsibility for making certain that any person to whom those responsibilities may be delegated performs them in proper fashion. The Operating Agreement also contains indemnification provisions which remain open and active so long as a manager exists who may have to undertake action in relation to the property or the other affairs of the corporation. The Members/ other contracting parties, in turn, were obligated to provide compensation to the Manager in the manner stated in the Agreement. The foregoing obligations are significant, and ongoing (i.e., remained in part unperformed on the date of Cahillane's bankruptcy petition). It is also clear that the failure of either party to perform the foregoing obligations would constitute a material breach of the Agreement, excusing performance by the non-breaching party; *See, Collins v. McKinney*, Ind. App., 871 N.E.2d 363, 375 (2007) [stating the five elements applied by Indiana courts in determining whether or not a contract breach is material].[12]

[12] Parenthetically, the court considers the obligations imposed by Section 2.1 and Section 2.6 (to the extent of the mandatory distribution stated in that section) to be ministerial

The court thus determines that the Operating Agreement is an executory contract within the meaning of 11 U.S.C. § 365.

The defendants argue that 11 U.S.C. § 365(c)(1)(A) precludes the Trustee's assumption of Cahillane's management position under the executory contract, because the contract is one for "personal services" under applicable Indiana law. This argument is significantly undermined by the provision of Section 5.1, which allows the manager to "delegate all or a portion of management responsibilities", without any controls on that delegation on the part of the members. Thus, were the Trustee to step into the place of Cahillane by means of assumption of the contract, 11 U.S.C. § 365(c)(1)(A) would not preclude the assumption of the contract.

However, the death knell for the Trustee is 11 U.S.C. § 365(d)(1), which requires the assumption of an executory contract in a Chapter 7 case within 60 days after the order for relief. The filing of the Chapter 7 petition by which this case was initiated constituted the order for relief; 11 U.S.C. § 301(b). The Trustee didn't assume the contract, or take any action to assume the contract, within the required 60 day period. As a result, the Operating Agreement, as an executory contract, has been rejected.

The Trustee argues on page 38 of his initial memorandum that the fact that neither Sparks nor Nabhan have filed a proof of claim in the Chapter 7 case precludes them from asserting claims against the bankruptcy estate or the Trustee. This argument is apparently advanced as a bar to standing of the defendants to any assertion that the Operating Agreement is an executory contract and has been deemed abandoned. The filing of a claim in a bankruptcy case is an entirely voluntary act, and while the failure to file a claim may preclude

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and to not be significant unperformed obligations under the contract; however, the discretionary disbursements provided for by Section 2.6, if never made upon consultation with the members, might give rise to a significant unperformed obligation.

standing with respect to an objection to distribution to be made to creditors, whether or not a claim has been filed has nothing whatever to do with matters under 11 U.S.C. § 365. A party to an executory contract is a party to an executory contract, whether or not a claim is filed with respect to monetary amounts sought to be recovered through the bankruptcy estate in relation to that contract. The Trustee has cited no law which supports his contention that a party is barred from seeking relief in relation to an executory contract if that party has failed to file a proof of claim, and indeed the court is confident there is no such authority. The Trustee's argument in this context is without merit.

Turning to the motion's requests for relief from the automatic stay, the compound motion filed on February 16, 2007 sought alternative relief – either a determination that the contract had been rejected, or various forms of relief from the automatic stay. Due to the determination of rejection of the contract, the alternative request for stay relief is moot under the terms of the motion's requests for relief, and is therefore denied.[13]

However, a portion of the motion for stay relief seeks authority to "proceed with the purchase and sale transaction between of the Mariposa Property" (whatever that is intended to mean); "to return the $682,246.00 wired by Charles Sparks back to Charles Sparks from any sale proceeds of the Mariposa Property; and to place the remaining balance of the proceeds from the sale of the Mariposa Property in a court approved investment account until this Court

[13] However, to the extent that prior to rejection Cahillane had totally vested and enforceable legal interests recoverable or enforceable under the contract to the extent fully executed prior to rejection, those interests constitute property of the Chapter 7 bankruptcy estate and any action to affect any such interests would involve the Trustee as a necessary party. The defendants' motion does not encompass a request for determination of any possible interests of the Chapter 7 estate under the Operating Agreement, or termination of all such possible interests. The motion in part requested a determination that the contract had been rejected by operation of 11 U.S.C. §365, a determination which the court has made. The court expresses no opinion on the consequences of rejection. The court further expresses no opinion on the extent to which stay relief might have been granted had the motion for contract rejection been determined adversely to the defendants.

issues a final order in the Adversary Proceeding related to movants and the Mariposa Property". As the court has stated previously in this memorandum of decision, whether or not the Mariposa Property constitutes property of Cahillane's bankruptcy estate has yet to be determined. If it were to be so determined, then no sale of the property could take place without compliance with the requirements of 11 U.S.C. § 363, and any act by any person other than the Trustee to exercise control over the property in any way is stayed by 11 U.S.C. § 362(a). The status of the Mariposa Property as property of this bankruptcy estate is therefore presently in a state of flux, and this portion of the motion's request for relief is in a sense not ripe for decision under any circumstance. Lest anyone misperceive the court's view as to matters relating to any transfer of an interest in that property until a determination has been finally made as to whether or not that property constitutes property of this Chapter 7 bankruptcy estate, the court finds that the enjoining of any transfer of any interest in the Mariposa Property -- including any encumbrance, gift, or sale of any interest in that property – by any entity as defined by 11 U.S.C. §101(15) is necessary to carry out the provisions of Title 11 of the United States Code with respect to the administration of the Chapter 7 estate of Thomas Cahillane. Any such transfer is therefore enjoined pursuant to 11 U.S.C. § 105(a), absent an order of the court specifically authorizing such transfer.

The court thus determines the following with respect to the relief requested by the defendants' Motion to Reject Executory Contract or in the Alternative Lift of Automatic Stay:

1. The Operating Agreement is an executory contract which has been rejected by the Chapter 7 bankruptcy estate of Thomas Joseph Cahillane by operation of 11 U.S.C. § 365(d)(1).

2. The defendants' requests for relief from the automatic stay of 11 U.S.C. § 362(a) are denied.

3. Any transfer of any interest in the Mariposa Property -- including any

encumbrance, gift, or sale of any interest in that property – by any entity as defined by 11 U.S.C. §101(15) is enjoined pursuant to 11 U.S.C. § 105(a), absent an order of the court specifically authorizing such transfer.

## V. CONCLUSION AND DETERMINATION

IT IS ORDERED as follows:

1. The defendants' motion for summary judgment with respect to Count I of the amended complaint is denied.

2. The defendants' motion for summary judgment with respect to Count II of the amended complaint is denied.

3. The defendants' motion for summary judgment with respect to Count III of the amended complaint is denied.

4. The defendants' motion for summary judgment with respect to Count IV of the amended complaint is granted.

5. The motion of the defendant Charles R. Sparks for summary judgment with respect to Count V of the amended complaint is denied.

6. The motion of the defendant Ronald Nabhan for summary judgment with respect to Count VI of the amended complaint is denied.

7. The motion of the defendant Ronald Nabhan with respect to Count VII is granted.

8. The motion fo the defendant Charles R. Sparks for summary judgment with respect to Count VIII is granted.

9. The motion of the defendant Ronald Nabhan for summary judgment with respect to Count IX is granted.

10. The motion of the defendant Charles R. Sparks for summary judgment with respect to Count X is granted.

11. With respect to the defendants' Motion to Reject Executory Contract or in the Alternative Lift of Automatic Stay:

A. The Operating Agreement is an executory contract which has been rejected by the Chapter 7 bankruptcy estate of Thomas Joseph Cahillane by operation of 11 U.S.C. § 365(d)(1).

B. The defendants' requests for relief from the automatic stay of 11 U.S.C. § 362(a) are denied.

C. Any transfer of any interest in the Mariposa Property -- including any encumbrance, gift, or sale of any interest in that property – by any entity as defined by 11 U.S.C. §101(15) is enjoined pursuant to 11 U.S.C. § 105(a), absent an order of the court specifically authorizing such transfer.

## VI. THE COURSE OF FURTHER PROCEEDINGS

As outlined above, the court has determined that summary judgment will be granted to the defendant Nabhan with respect to Counts VII and IX; that summary judgment will be granted to defendant Sparks with respect to Counts VIII and X; and that summary judgment will be granted to the defendants as to Count IV.

The thread that weaves its way through the fabric of the other counts is the identity of the person or entity who acquired property interests in the Mariposa property as a result of the purchase transaction with either Paul Stitt individually or Mariposa of Indiana, Inc. Certain surviving counts of the amended complaint will become moot depending upon the court's determination of the identity of that person or entity. Fed.R.Bankr.P. 7042 applies Fed.R.Civ.P. 42 to adversary proceedings. Fed.R.Civ.P. 42(b) states:

> **(b) Separate Trials.** For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

The foregoing rule allows the court to order a separate trial of "any separate issue". The court deems the circumstances resulting from determination of the defendants' motion for summary judgment to be a prototypical example of the circumstances in which a separate issue should be tried pursuant to Rule 42(b), i.e., the identity of the purchaser in the transaction involving the Mariposa property. Was the purchaser actually Thomas J. Cahillane, utilizing the alternative name of "TC Investments, LLC" in his individual capacity? Was the purchaser intended by the parties to be a corporate entity registered in the State of Indiana as "T.C. Investments, LLC"? The answer to this question will become clear on the final exam, i.e., at the trial with respect to this issue. Upon determination of this issue, the remaining issues with respect to the counts of the amended complaint which survived the motion for summary judgment will be clarified.

IT IS ORDERED that the issue of the identity of the purchaser of the Mariposa property pursuant to contracts with Paul Stitt and/or Mariposa of Indiana, Inc. will be tried separately pursuant to Fed.R.Bankr.P. 7042/Fed.R.Civ.P. 42(b).

IT IS FURTHER ORDERED that a telephonic preliminary pre-trial conference will be held on **April 15, 2009, at 10:00 A.M.** to address the trial of the foregoing issue, and further proceedings in this adversary proceeding.

Dated at Hammond, Indiana on March 11, 2009.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Attorneys of Record